Editor's note: 92 I.D. 317; Appealed -- Editor's note: aff'd, Civ.No. A86-042 (D.Alaska Mar. 18, 1988) dismissed for lack of prosecution, No. 88-3844 (9th Cir. Dec. 13 1988)

B. J. TOOHEY, C. D. TOOHEY

and C. W. TOOHEY

IBLA 82-1181 Decided July 23, 1985

Appeal from three decisions of the Alaska State Office, Bureau of Land Management, declaring unpatented mining claims null and void ab initio and rejecting location notices filed for recordation. AA-43572 through AA-43608, AA-43609 through AA-43655, and AA-43831 through AA-43850.

Affirmed as modified.

1. Alaska: Statehood Act -- Mining Claims: Lands Subject to -- Segregation -- State Selections

   Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

2. Mining Claims: Lands Subject to -- Segregation -- State Selections

   Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted

on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

3. Mining Claims: Lands Subject to -- Segregation -- State Selections

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

4. Mining Claims: Lands Subject to -- Segregation -- State Selections

Although the Board has on one occasion undertaken an in pari materia consideration of various land status records (i.e., the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an in pari materia consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

5. Mining Claims: Lands Subject to -- Withdrawals and Reservations: Generally

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until

the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Appeal is taken from three June 30, 1982, decisions of the Alaska State Office, Bureau of Land Management (BLM), declaring unpatented placer mining claims of B. J. Toohey, C. D. Toohey, and C. W. Toohey (appellants) null and void ab initio and rejecting location notices filed for recordation. Events surrounding the three groups of claims are set forth below.

Claims AA-43572 through AA-43608

(Golden Claims 101 through 137)

Location notices for the above 37 placer mining claims were filed on June 11, 1981, by Cynthia D. Toohey and her daughter, Camden W. Toohey, with

the Alaska State Office, BLM, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982). The location notices indicate the claims were all located on March 14, 1981, within an area encompassed by protracted secs. 3, 4, 9, 10, and 11, partially surveyed T. 10 N., R. 2 E., Seward Meridian, Alaska. Appellants submit that these claims lie entirely within the Chugach National Forest, although BLM's decision states that they lie partially within the National Forest.

BLM's June 30, 1982, decision rejected the recordation filings and declared the claims null and void ab initio on the following grounds: (1) State selections A-053727, A-058731, and A-063695 segregated the land pursuant to 43 CFR 2627.4(b); (2) a portion of the claims lie within land patented to the State in 1972 by patent No. 50-73-0028; and (3) the notation on the master title plat (MTP) of Forest Service withdrawal application AA-23139 segregated the land from mineral entry pursuant to the "Notation Rule."

Claims AA-43609 through AA-43655

(Glacier Claims 201 through 247)

Location notices for the above 47 placer mining claims were filed June 11, 1981, by Cynthia and Camden Toohey with the Alaska State Office. The notices reflect that these claims were located on March 14, 1981, within an area encompassed by protracted sec. 2, partially resurveyed T. 10 N., R. 2 E., and protracted secs. 25, 27, 34, 35, and 36, unsurveyed T. 11 N., R. 2 E., Seward Meridian, Alaska. These claims lie entirely within the

Chugach National Forest. BLM's final decision regarding the foregoing claims states:

> Because all of the mining claims in Tps. 10 N. and 11 N., R. 2 E., Seward Meridian listed on the attached appendix were located in March 1981, after the lands in question had been segregated from mineral entry by Forest Service withdrawal application AA-6060, and State selection applications A-053727, A-063695, and A-067451, all 47 placer mining claims listed on the attached appendix are declared null and void ab initio, and the FLPMA recordation filings are rejected in their entirety.

BLM June 30, 1982, decision at 2.

Claims AA-43831 through AA-43850

(Toohey Claims 1-16, 19-21, 24-26, 31-32) 1/

Location notices for the above 20 placer mining claims were filed June 29, 1981, by B.J. Toohey and his wife, Cynthia Toohey, with the Alaska State Office. The notices reflect that these claims were located on April 6, 1981, and April 13, 1981, and lie within an area encompassed by protracted sec. 3, partially surveyed T. 10 N., R. 2 E., and protracted secs. 27 and 34, unsurveyed T. 11 N., R. 2 E., Seward Meridian, Alaska. These lands are situated entirely with the Chugach National Forest. BLM's final decision regarding these claims states:

1/ Appellants' statement of reasons (SOR) characterizes this group of claims as "Toohey Claims 1 through 17." The administrative record contains 20 separate location notices as identified in the appendix to BLM's decision for this group of claims. Appellants' notice of appeal, dated July 20, 1982, identified 19 of these claims for review, i.e., Toohey Mining Claim Nos. 1-8; 11-12; 15-16; 19-21; 25-26; 31-32.

Because all of the mining claims in Tps. 10 N. and 11 N., R. 2 E., Seward Meridian listed on the attached appendix were located in April 1981, after the lands in question had been segregated from mineral entry by Forest Service withdrawal application AA-6060, and State selection applications A-058731, A-053727, A-063695, and A-067451, all 20 placer mining claims listed on the attached appendix are declared null and void ab initio, and the FLPMA recordation filings are rejected in their entirety.

Appellants' Position

Noting that all four State selection applications cited by BLM identify the entirety of T. 10 N., R. 2 E. and/or T. 11 N., R. 2 E., Seward Meridian, 2/ including lands which lie within the Chugach National Forest, appellants submit that such applications are defective because section 6(b) of the Alaska Statehood Act, 72 Stat. 339, does not allow for selections within the Chugach National Forest. As stated by appellants, "The State of Alaska simply has found it expedient to list an entire township in its applications, without initial regard for the legality of selecting that full area" (SOR at 6).

2/ The four State selection applications as per last amendments of record are:

Serial Number	Land Description
A-053727	Entire T. 10 N., R. 2 E., Seward Meridian
A-058731	Entire T. 10 N., R. 2 E., Seward Meridian (Mineral Estate)
A-063695	Entire T. 10 N., R. 2 E., Seward Meridian
A-067451	Entire T. 11 N., R. 2 E., Seward Meridian

Appellants acknowledge that section 6(a) of the Statehood Act permits State selections from national forest lands, 3/ but state: "It simply is indisputable that the four State selection files are generically Section 6(b) applications, which, by operation of law, do not apply to national forest lands" 4/ (SOR at 7).

In addition to arguing that the State selections had no actual segregative effect, issue is taken with BLM's position that, valid or not, the mere recording of a State selection on the MTP operates to bar the land from further appropriation. The same position, an embodiment of the "notation rule," discussed infra, is set forth in the decisions appealed from concerning the effect of two Forest Service withdrawal applications noted on the MTP prior to the filing of the mining claim location notices here involved.

3/ Section 6(a) states in part:

"For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: * * *."

4/ Section 6(b) states in part:

"The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: * * *."

Discussion

[1] We first examine whether the State selection applications independently bar appellants' claims. Two Departmental regulations are pertinent to this inquiry, each of which attributes a segregative effect to the filing of a State selection application.

At 43 CFR 2091.6-4, it is provided:

> Lands desired by the State under the regulations Subpart 2600 will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c). Such segregation will automatically terminate unless the State publishes first notice as provided by § 2627.4(c) within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

With respect to State selections in Alaska, 43 CFR 2627.4(b) provides:

> (b) Segregative effect of applications. Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

While the above regulations, in effect since 1971, clearly attribute segregative effect through the filing of State selection applications, appellants submit that the regulations contain important qualifications that the

selections at issue fail to meet. Thus, it is noted that section 2627.4(b) allows for segregation only of lands "desired" by the State and that the State could not possibly have desired lands within the Chugach National Forest through the filing of a selection application under section 6(b) of the Statehood Act when that section does not allow for selections within national forests.

There is little doubt that the four State selection applications were filed pursuant to section 6(b) of the Statehood Act. As to three of these, A-053727, A-058731, and A-063695, BLM so labeled the applications in its June 30, 1982, decision rejecting mining claim location notices filed by David Cavanagh and Gary McCarthy, a case also before the Board on appeal 5/ which involves similar issues of fact and law. The other State selection application at issue, A-067451, has also been regarded by BLM as a section 6(b) application, and, in fact, by decision dated June 17, 1980, this application was rejected in part due to its inclusion of Chugach National Forest lands.

In its Answer Brief, 6/ BLM disputes appellants' contention that the State of Alaska did not "desire" lands within the Chugach National Forest:

> These regulations [43 CFR 2091.6-4 and 2627.4(b)] cannot be distinguished on the basis of the appellants' assertions that the State did not "desire" the land in dispute since it was actually unavailable to the State. The land is not only clearly described in the three State selections, but letters from the State of

5/ IBLA Docket No. 82-1188.
6/ BLM's Answer Brief in Toohey consists of and incorporates by reference its Answer Brief in Cavanagh, supra.

> Alaska, which are contained in the official BLM record, specifically state that the State wants all the land in T. 10 N., R. 2 E. * * * The only exclusion mentioned by the State is for patented (non-federal) land. National forest land is not specifically excluded from the State's explicit application for the entire township. [Emphasis in original.]

(Answer Brief at 4-5).

The State of Alaska has not appeared in this case. The State's alleged desire for Chugach National Forest lands, as propounded by BLM on appeal, is belied, however, by its failure to appeal BLM's June 17, 1980, decision rejecting in part State selection application A-067451, not to mention its nonparticipation in this proceeding. The foregoing decision states in pertinent part:

> On March 10, 1966, the State of Alaska filed general purposes grant selection applications A-067449, A-067450, and A-067451, for lands in Tps. 12 and 13 N., R. 3 E. and T. 11 N., Rs. 2 and 3 E., Seward Meridian, under the provisions of Sec. 6(b) of the Statehood Act. These lands are located in the Chugach Mountains and the State's selections were valid at the time of filing.
>
> The original application for A-067451 was for all lands outside the Chugach National Forest, however, subsequent amendments were filed which included all the lands within T. 11 N., Rs. 2 and 3 E., Seward Meridian.
>
> * * * * * * *
>
> The lands described which are within the Chugach National Forest, approximately 18,280 acres in T. 11 N., R. 2 E., Seward Meridian and 21,120 acres in T. 11 N., R. 3 E., Seward Meridian * * * were not, at the time of selection, nor are they now, vacant, unappropriated, or unreserved (43 CFR 2627.3(a) [7/] and therefore are not proper for selection and are hereby rejected.

7/ 43 CFR 2627.3 includes regulations under the heading "Grant for general purposes" and is the regulatory counterpart to section 6(b) of the Statehood Act. Cf. 43 CFR 2627.1, Grant for community purposes (corresponding to section 6(a) of the Act).

BLM's Answer Brief is noticeably silent regarding the above decision. Appellants' SOR here and in Cavanagh takes due note of the significance of this adjudicatory action as far as the segregative effect of the pendency of State selection application A-067451 is concerned.

In John C. and Martha W. Thomas (On Reconsideration), 59 IBLA 364 (1981), the Board agreed that the provisions of 43 CFR 2091.6-4 and 2627.4(b) attribute a segregative effect to the filing of a State selection application. We stated, however:

> The only limitation is that the selection must be "regular on its face." State of New Mexico, 46 L.D. 217, 222 (1917), overruled on other grounds, 48 L.D. 97 (1921). There is no evidence in the present case that State selection application F-43788 was not regular on its face when filed. [Footnote omitted.]

Id. at 367.

Neither BLM nor the Board found the State selection application to be irregular in Thomas. This cannot be said here. As to State selection application A-067451, BLM has formally ruled that the State could not select Chugach National Forest lands in its section 6(b) application. Appellants submit that the same decision was made by BLM in 1966 concerning State selection application A-053727. 8/ We agree that a plain reading of the Statehood

8/ Appellants' SOR at page 8 observes that by decision dated Aug. 2, 1966, BLM rejected State selection A-053727 to the extent Chugach National Forest lands were described. Exhibit 2 to the SOR, a copy of a State Office decision dated July 27, 1972, re A-053727, states in part:

"When Tract A, T. 10 N., R. 2 E., Seward Meridian, and U.S. Survey 4805, are patented to the State, title to all of the public land in this township will have passed from Federal jurisdiction with the exception of the lands in the Chugach National Forest which were rejected from the selection by the decision of August 2, 1966."

Act and the Department's implementing regulations conveys that national forest lands are not to be selected under authority of section 6(b) of the Act. 9/

[2] However, it has been held that after a State selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection was void or voidable. Thomas, supra, at 366. This is the so-called "notation" or "tract book" rule.

The notation or tract book rule is not a creature of regulation; 10/ rather, it has evolved through adjudication, dating from the early days of the General Land Office to the present. In 1917, First Assistant Secretary Vogelsang recited:

> [T]he orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

California and Oregon Land Co. v. Hulen and Hunnicutt, 46 L.D. 55, 57 (1917).

9/ Even if the State selection applications are claimed to have been filed under section 6(a) of the Statehood Act, which allows for selections within national forests, the selection applications would not be regular on their face. At 43 CFR 2627.1(b), it is provided: "In addition to the requirements of § 2627.3(c), where the selected lands are national forest, the application for selection must be accompanied by a statement of the Secretary of Agriculture or his delegate showing that he approves the selection." None of the four State selection applications in this case contains such a statement.

10/ BLM errs in representing that "the general notation rule is set out at 43 CFR 2091.1" (Answer Brief at 4). While no "general notation rule" is found in 43 CFR, it is codified in particular ways. See, e.g., 43 CFR 1825.1(b) (relinquishments).

The notation rule has been described as an equal protection doctrine, grounded in fairness to the public at large. In Margaret L. Klatt, 23 IBLA 59 (1975), we stated:

> The notation rule, which insofar as the public is concerned, strives to give to all the public an equal opportunity to file (Max L. Kreeger, 65 I.D. 185, 191 (1965)) presupposes that the item noted on the records, i.e., a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would-be applicant who does not go behind it. That is, a notation of a patent on the records segregates the land it describes from a later application, even though the patent is invalid. A later applicant, knowing of the invalidity, can gain no right to the land until the patent is canceled and the cancellation noted on the proper records. Anyone else interested in the land, whether he knows of the defect or not, can also rely on the fact that no other person can establish a prior right so long as the entry remains of record. The record itself constitutes a bar to any other filing whatever the situation may be on the land itself. Thus, everyone may rely on the record to give him an equal opportunity to file when the land again becomes available.

23 IBLA at 63-64.

Applying the notation rule to an oil and gas leasing case, the Board said the following in Paiute Oil & Mining Corp., 67 IBLA 17 (1982):

> The notation rule was explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark re Jay P. Nielson v. J. E. Keogh, Civ. No. C-158-63, as follows:
>
> > [I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. Bunker Hill Co. v. United States, 226 U.S. 548, 550 (1913);

> McMichael v. Murphy, 197 U.S. 304, 310-312 (1905); Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); Hastings etc. Railroad Co. v. Whitney, 132 U.S. 357, 360-366 (1889); Putnam v. Ickes, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); Germania Iron Co. v. James, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. dism. 195 U.S. 638.
>
> Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation -- even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in Martin Judge, 49 L.D. 171, 172 (1922) that "until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit." None of the numerous amendments of the Act since 1922 has questioned the Martin Judge decision which has been uniformly followed by the Department of the Interior. Joyce A. Cabot, 63 I.D. 122-123 (1956); R. B. Witaker, 63 I.D. 124, 126-128 (1956); Albert C. Massa, 63 I.D. 279, 286 (1956). [Emphasis added.]

67 IBLA at 20.

Among other things, appellants submit that "the concept of a 'notation rule' itself was implicitly overruled by the U.S. District Court in Kalerak v. Udall, Civil A-35-66 (D. Ark., October 20, 1966)" and that on review by the Ninth Circuit Court of Appeals, "that court refused to reach the issue of whether the lower court ruling was correct. 396 F.2d 748" (SOR at 14).

The above litigation evolved from a Departmental decision in State of Alaska, 73 I.D. 1 (1966), applying the notation rule to appropriations of record that were void or voidable. The reversal of this decision by the

Federal district court in Kalerak v. Udall, supra, and the Ninth Circuit's subsequent review of the district court's decision was scrutinized by the Board in State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972):

> As pointed out in Cabot, supra, at 123, whether the outstanding record appropriation is void or voidable is immaterial. If such appropriation is outstanding on the tract books, the land is not subject to further appropriation, citing Martin Judge, 49 L.D. 171 (1922). See Sarah Ann Christie, 3 IBLA 7 (July 6, 1971); George E. Conley, 1 IBLA 227 (January 13, 1971).
>
> It is true that in Kalerak v. Udall, Civil A-35-66, U.S.D.C. Alaska, October 20, 1966, the United States District Court found that the application of the State of Alaska, filed while the lands were withdrawn, "* * * was a nullity * * *" and "* * * [t]he so-called amendments, or additional selections during the 90-day period [restoration preference right period for the State to file selections], which did not embrace the lands selected on January 8, 1963 [at which time the lands were withdrawn], did not serve to validate the prior void selection."
>
> The district court did not address itself specifically to the Cabot doctrine spelled out above, but implicitly it did not regard that doctrine as having any force.
>
> However, the United States Court of Appeals for the 9th Circuit decision in Kalerak, at 396 F.2d 748, reversed the district court decision on the issue of the amendments and stated:
>
> > We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even if defective, accomplished a segregation of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.
>
> We adhere to the Cabot doctrine that an entry outstanding on the proper records of the land office, even though the entry may be void or voidable precludes the appropriation of the land until it is canceled on such records.

73 I.D. at 395-96.

That the judiciary has in fact embraced the notation rule in a long line of cases is chronicled by BLM as follows:

The notation rule is not, however, just a Departmental policy, as the appellants suggest. Rather, the courts have consistently adhered to and enforced the rule. Hodges v. Colcord, 193 U.S. 192, 194-195 (1904); McMichael v. Murphy, 197 U.S. 304, 310-312 (1905); Holt v. Murphy, 207 U.S. 407, 415 (1907); Germania Iron Co. v. James, 89 F. 811 (9th Cir. 1898); Neff v. United States, 165 F. 273, 281 (8th Cir. 1908); Wright v. Paine, 289 F.2d 766, 768 (D.C. Cir. 1961); and United States v. Central Illinois Public Service Company, 365 F.2d 121, 122 (7th Cir. 1966), cert. denied, 386 U.S. 308 (1967).

As early as 1898 the Eighth Circuit Court of Appeals found it error to not follow the "settled practice" and "long line of decisions by department officers" that until a notation of cancellation was made the land was not open for entry or disposal. Germania Iron Co. v. James, supra, 89 F. at 812. The Circuit Court specifically found that the notation rule "was reasonable and just," Id., 814, and ". . . gave equal opportunities to all applicants, brought the necessary information to the local land officers in time to enable all who intended to apply for the land to obtain and act upon it without expense, and was fair, fitting, just, and reasonable." Id., 815. The Eighth Circuit Court later reaffirmed this by holding:

> The general rule, repeatedly announced by the Supreme Court and followed by the Land Department, is that an entry of public land under the laws of the United States segregates it from the public domain, brings it within the exceptions of the railroad land grants, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed [citations omitted].

Neff v. United States, supra, 165 F. at 281.

* * * * * * *

More recently, another circuit court decision held:

> An entry on public land which is prima facie valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside. McMichael v. Murphy, 197 U.S. 304, 311, 25 S.Ct. 460, 49 L.Ed. 766 (1905). Since the Walker entry was still a matter of official record, Nikle acquired no interest in the land and his certificate was properly cancelled. Cornelius v. Kessel, 128 U.S. 456, 461[,] 9 S.Ct. 122, 32 L.Ed. 482 (1888).

> United States v. Central Illinois Public Service Co., supra, 365 F.2d at 122. See also, Wright v. Paine, 289 F.2d at 768.

(Answer Brief at 10-16).

Notwithstanding all the good said about the notation rule, appellants are not alone in their criticism of the doctrine, which they contend is antiquated, arbitrary and capricious, and violative of due process. Most recently, it is even in disfavor with BLM.

On January 12, 1984, the Director, BLM, issued Instruction Memorandum (IM) No. 84-216 to all State Directors, forwarding draft regulations to replace 43 CFR Subpart 2091. The draft regulations evolved from a task force formed in October 1983 "to evaluate the Bureau's use of the so-called 'Tract Book/Notation Rule' and to develop comprehensive instructions concerning how and when lands are opened or closed to operation of the various public land and mining laws."

As background to the draft regulations, enclosure 1 of IM 84-216 states:

> The present regulations, 43 CFR 2091, do not adequately specify the dates when closures occur, and do not explain clearly the effect of the closures. Also, there is almost no mention of when or how lands are opened.
>
> For example, the present regulations on the Recreation and Public Purposes Act state that lands classified for Recreation and Public Purposes are segregated (closed) from all appropriations, including the mining laws for a period of 18 months, after which time the classification will be vacated and the land restored to its former status. This sounds specific upon first

reading, but it leaves many unanswered questions for the BLM employees who maintain the public land records and for the public who use the records.

- On what date does the 18 month period start?

- What does "segregated from all appropriations" mean? Is the land open to mineral leasing? Material sales?

- What action, if any, is needed to open the land?

- On what date is the land opened?

These kinds of questions and uncertainties have led to the continued use of the "notation rule" or "tract book rule" as the basis for establishing opening and closing dates on the public land records.

The notation or tract book rule had its origins in the early Land Offices. The clerks would handwrite in the tract books information about an entry or a relinquishment filed in the office on that same day, or an order signed in Washington days, weeks or months earlier. The effective date the land was closed or opened was the date this handwritten entry first gave public notice on these public records that a change of land status had occurred.

Records were noted by any employee who was working with the document and the notation process was usually accomplished promptly. The interested public was the local public and they monitored the daily notations to find out what changes had occurred and what lands were newly available. The notation procedure was appropriate to the circumstances of the time and the mission of the General Land Office.

Times have changed, communications and transportation have improved, and a much wider spectrum of the public is interested in the changing status of the public lands. To further complicate matters, in the early 1960's the Bureau in most offices adopted a new land record system, replacing the tract books with plats and historical indices. No longer could any clerk handnote the records. The new records are updated by drafting and typing processes which delay getting land status changes onto the public land records for days, weeks, or even months, depending upon the workload in the office.

These logistical problems in updating the records, combined with the lack of specific regulatory or other guidelines for opening and closing lands, have perpetuated the use of the notation rule as the one sure way of setting and announcing dates when specific areas of public lands are closed or opened to applications, selections, settlements, entries or locations.

> These draft regulations would eliminate the further necessity for the notation rule because they specify when and how the lands become closed and opened. These draft regulations utilize three basic principles:
>
> 1. Closures that have a specific time period stated in the closing document automatically become open on the date the closure expires. (The public will know the future opening date as soon as the closure is first noted on the records.)
>
> 2. Closures that do not have a specific time period stated in the closing document will be opened by an order or notice published in the Federal Register that will specify an opening date, usually at least 30 days after the date of publication. (This will give adequate time to get the records properly noted in advance of the opening date.)
>
> 3. Lands in an expired or terminated withdrawal will not become open until an opening order is published in the Federal Register which will specify the opening date. This practice will continue to protect the lands while the Secretary or Congress can decide whether or not to extend the withdrawal.
>
> If these regulations are adopted, the regulations and the decision documents will establish the dates of closing and opening and these dates will be identified on the records well in advance of the opening dates. The notation rule will cease to exist because it will no longer govern the dates when public lands are closed or opened. In fairness to existing applications, claims and entries, these will be adjudicated under the principles of the notation rule in accordance with existing practices and case law precedents. [Emphasis in original.]

The draft regulations have not been published as final, or even proposed, rules. However, even if they had been published as final rules in their proposed form, they would not be controlling in this case, as they are intended to have prospective application only. 11/

That BLM is considering and may adopt regulations that emasculate the tract book/notation rule principle is the agency's prerogative. Nevertheless,

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11/ Draft section 2091.0-7(c) reads:

"On the effective date of these regulations, the practice of record notation will no longer govern the availability of public lands except as provided in the regulations. All pending locations, claims, and applications will be subject to adjudication under the tract book rule principle in accordance with existing practice and case law precedents."

the present state of the law is that the notation rule may be utilized and that it fulfills an important land management function.

As the Secretary's delegate for providing objective, quasi-judicial review of BLM decisionmaking, the Board's role in a case of this type is to determine if the agency's invocation of the notation rule to reject appellant's mining claims was either legal error or an arbitrary and capricious act. The mere fact that the notation rule has passed muster with the courts does not preclude us from finding the Bureau's application of the doctrine to be wrong in particular circumstances.

Here, the notation rule was invoked under two kinds of appropriations -- State selection applications and Forest Service withdrawal applications. We now consider whether BLM erred in applying the notation rule in these specific respects.

The four State selection applications were recorded on the MTP for the entirety of T. 10 N., R. 2 E., and T. 11 N., R. 2 E. Seward Meridian, at the time appellants' mining claims were located in 1981. State selection application A-053727 was a closed file by this date, having been adjudicated in July 1972 and the record transmitted to the General Services Administration Federal Records Center 2 years later (Serial Register, A-053727, at 3). The other three State selection files appear to remain open records, though one of these, A-067451, was adjudicated in June 1980. Unlike the other three State selection notations that appear in the right-hand column of the MTP, A-067451 is noted on the plat by lettering within one section only.

Appellants contend that BLM has placed undue reliance on whatever the MTP shows:

> [V]irtually all of the various permutations on a "notation rule" embodied in the administrative and judicial decisions cited in the Answer of the BLM are quite different from the statement in the Decision of June 20, 1982. None of those earlier decisions refers to an omnipotent "master title plat." All of those decisions address more generally "the records," "the proper records," "the official records," "the plats and records," etc. Hence, whatever the vague "notation rule" is stated to be, it must include all of the proper BLM records -- including the master title plats, the use plats, the historical index, the serial register, the application files, and the Federal Register, inter alia.
>
> Those same decisions cited in the Answer of the BLM require that this vague "notation rule" applies only to all of the records "in pari materia." E.g., State of Alaska, Kenneth D. Makepeace, 79 I.D. 391, 39 [sic] (1972). If the records must be construed together, the Alaska State Office cannot take the narrower position that notations on one official record (the master title plat) define the land status independent of all other legitimate record sources of land status information.
>
> > We believe that the proper filing of the homestead application cannot be predicated on a "pick and choose basis," i.e., an assertion by the appellee that he relied upon the plat and historical index to the exclusion of the State selection serial register sheet, particularly where the plat referred to the State selection application. [Citations omitted.]
>
> Id. The Alaska State Office cannot "pick and choose" from among official records to reach a conclusion not supported by the official record as a whole. Indeed, the above quotation from Makepeace indicates that no entryman can legally rely upon the plat "to the exclusion of the State selection serial register sheet." If an entryman cannot rely on that plat in isolation, how can the Alaska State Office deny an entry by reference to that plat in isolation?

(Reply Brief at 14-16).

[3] While it is true that the Board's decision in Makepeace allows for construing various BLM lands records in pari materia, it also acknowledges that the MTP may independently serve as a prima facie showing of land status:

> Thus, it appears that on February 2, 1967, the plat showed prima facie that the lands in issue were embraced in the state selection application. It is true that the historical index shows a homestead entry affecting the lands in issue, but further reference to the serial register sheet of the state selection application, whose number was shown on the plat, would have demonstrated the appropriation of the land.
>
> Either on the basis of the prima facie appropriation of the land shown by the plat or on the basis of the plat, historical index, and serial register sheet of the state selection application, the land office records reflected the appropriation of the lands in issue.

79 I.D. at 391, 396. In Thomas, supra, the Board again observed that noting a State selection application on the MTP amounts to a "prima facie appropriation of the land," quoting Makepeace with approval. 59 IBLA at 366. The Board concluded that "even though the State selection may have been void or voidable, the notation rule itself precluded appropriation of the land until canceled on such records." Id. This position was recently repeated in William Mrak, 86 IBLA 16 (1985):

> The segregative effect of a State of Alaska selection application is operative on the land for which the State has applied from the date of filing and remains in effect until the State's application is finally disposed of and duly noted on BLM's public land records.
>
> * * * * * * *
>
> The records forwarded to the Board for this review do not indicate whether the State's selection applications have been adjudicated by BLM and a final disposition achieved in each case. There is also the possibility that each may have been automatically terminated pursuant to the provisions of 43 CFR 2627.4(b). Final disposition of the applications, however, does not change the result in this case because the notations on the official BLM tract records for the township in question reflecting that the applications were still pending at the time appellants initiated their locations were sufficient to perpetuate the segregative effect and preclude appellants' appropriation of the land. See Shiny Rock Mining Corporation (On Reconsideration), 77 IBLA 261 (1983).

Id. at 19. The "official BLM tract records for the township in question" referred to in Mrak are described earlier in the opinion as the master title plat.

In accordance with Thomas and Mrak, supra, we do not think it was error in this case for BLM to invoke the notation rule on the basis of State selections noted on the MTP's. While we know by examination of the State selection application files (and BLM's statements concerning these files) that the applications were submitted under the specific authority of section 6(b) of the Statehood Act, and that two of the applications were rejected in part because of their inclusion of national forest lands, these facts are not revealed by the entries made on the MTP's. The ordinary citizen contemplating a proposed use of the public lands for a valid purpose would quite reasonably look to other than lands embraced in townships 10 and 11 N., R. 2 E., Seward Meridian, upon discerning from the MTP for these townships that they were included in State selection applications. Further, there is nothing on the face of the MTP's that would suggest the State selection entries were invalid or conflicting. The notation rule was meant to apply to such circumstances. Makepeace, supra; Thomas, supra.

[4] Although the Makepeace decision included an in pari materia consideration of three land status records, i.e., the MTP, historical index (HI), and serial register sheet for a State selection application, as a further method of determining whether lands were appropriated at a particular time, this was only done because of a conflict noted between the MTP and the HI. The Board has examined copies of the HI for unsurveyed Tps. 10 and 11 N., R. 2 E., Seward Meridian, date-stamped September 4 and January 4,

1984, respectively. For township 10, the HI lists only one of the three State selection applications involved herein, viz., A-053727. The entry reflects that acreage was patented to the State pursuant to this selection application with an "action date" of July 28, 1972. Read in conjunction with the MTP for township 10, it does become evident from the HI that the status of State selection application A-053727 has not been updated on the plat. This isolated record conflict is of no assistance to appellants, however. Since the HI makes no reference to two pending State selection applications which the MTP depicts as affecting the township as a whole, A-058731 (mineral estate only) and A-063695, the presumptive ineligibility of township 10 for other appropriation still holds. 12/ Were it the case that the HI showed all the State selection applications recorded on the MTP to be adjudicated (which they were not), it would be reasonable to consider whether, under such

12/ Appellants submit that State selection application A-058731 was filed by the State under authority of section 4 of the Act of Sept. 14, 1960, 74 Stat. 1024, whereby the State may select the retained mineral rights of the United States in "lands which have been disposed of." Citing to a BLM State Office decision dated June 21, 1966, appellants contend that the State cannot select land for the reserved mineral interest of the United States until "issuance of a patent with reservation to the United States" (SOR at 9), and that the Chugach National Forest lands where appellants' mining claims lie, do not satisfy this definition of "disposed of" lands. Id.

It is not inconceivable that some of the lands within the Chugach National Forest could have lawfully been "disposed of" by the United States with a retained mineral interest, but is not clear from the record whether or to what extent this has occurred. We do note that mineral estate selection application A-058731 is denominated as a section 6(b) and 6(h) submission, although the language quoted from section 4 of the Act of Sept. 14, 1960, supra, was included by Congress as an amendment to section 6(a) of the Statehood Act (governing grants for community purposes). It is further noted from the final entry on the serial register sheet for this application that on Nov. 2, 1977, State selection A-058731 was "held for rejection in part," with no further details provided.

In light of the confusion that surrounds this application, the Board is not inclined to rule whether or not this selection stands as a bar to appellants' placer mining claims. Under a notation rule analysis, however, we do not have to. Regardless of whether the selection was void or voidable, its entry on the MTP segregated the mineral estate for all eligible lands within township 10 from other appropriations.

circumstances, BLM misapplied the notation rule in this case. Similarly, it is noted that the HI for township 11 makes no reference to the State selection application filed therefor, A-067451, which is shown on the MTP to be a pending application (even though it was adjudicated in June 1980).

Nor do the serial register sheets for the subject State selection applications, standing alone or in conjunction with the records discussed above, pose a basis for appellants to have surmised that any of the land within townships 10 and 11 could be appropriated for mining. For State selection application A-053727, characterized by appellants as a "closed file," none of the entries found on the serial register sheets reveals that BLM rejected this application, in part, to the extent it included Chugach National Forest lands. Though this apparently occurred through BLM decision dated August 2, 1966, the entry beside this date on the register merely reads: "Tentative approval given to 18.43 acres." In any event, the serial register goes on to note that on June 16, 1972, selection application A-053727 was amended to include all of T. 10 N., R. 2 E., Seward Meridian, except patented lands. This is followed by entry dated August 23, 1972, noting that patent 50-73-0028 was issued July 28, 1972, for an area aggregating 7,911.11 acres. Even assuming that the foregoing register notations unequivocally signified that State selection application A-053727 did not operate as a bar to mining claim entries as of June 1981, when appellants' location notices were filed, the record still shows two other State selection applications affecting township 10, to wit: A-058731 (for mineral estate only) and A-063695. As already noted, the precise nature and status of State selection application A-058731 is in some doubt (see note 12). Assuming, in the light most favorable to appellants, that as a matter of fact and law Chugach National Forest

lands could not have been segregated from mineral entry by virtue of this mineral estate selection, such lands (surface and mineral) were nevertheless clearly segregated by virtue of State selection application A-063695. Unlike the other two State selection applications for township 10, A-063695 has been neither partially nor wholly adjudicated; it remains an open application as far as all public land records furnished the Board are concerned. The only challenge appellants make to this selection is the general charge that it "manifests all of the same limitations of the Section 6(b) selections noted above" and that "national forest lands were not 'open' to State selection by virtue of the type of application filed" (SOR at 9-10). This general challenge has already been discussed. It does not dispense with application of the notation rule to bar appellants' claims.

As to the one State selection application affecting T. 11 N., R. 2 E., Seward Meridian (A-067451), neither the HI nor the serial register contradicts what appears from the face of the MTP, i.e., that the lands within this township were segregated from mineral entry by virtue of this selection application. If anything, the evaluation of these three lands records in pari materia disposes of the conjecture that since the notation "A-067451 SS" appears on the MTP only in lettering found in one section of the township, rather than in the narrative column on the right-hand side of the plat, less than the full township was affected thereby. See Reply Brief at 20. Thus, the serial register for application A-067451 describes the selected lands at the time of filing as: "T. 11 N., R. 2 and 3 E., S.M., All lands outside of the Chugach National Forest boundary. Approximately 4,260 acres. Subject to prior valid rights, claims, and patented lands." Under date of June 16, 1972, the register records that this selection was amended to include:

"T. 11 N., R. 2 & 3 E., SM." Finally, as of June 17, 1980, the register notes: "Rejected in part. Tentatively approved for 6,309 acres." Without having the decision of June 17, 1980, at hand, 13/ it would not be possible from reviewing the serial register to know that Chugach National Forest lands had in fact been excluded from selection. 14/

The Board's findings and conclusions regarding the effect of the State selection applications noted on the MTP's for Tps. 10 and 11, R. 2 E., Seward Meridian, at the time appellants' mining claim location notices were filed may be summarized as follows. The fact that state selection applications A-053727, A-058731, A-063695, and A-067451 were recorded on the MTP's in question resulted in prima facie evidence that all lands denominated as selected were thereby segregated from subsequent appropriation. This prima facie segregative effect occurred even if the State selections were void or voidable. An in pari materia consideration of the HI and the serial register sheets in conjunction with the MTP's fails to establish that Chugach National Forest lands were excluded from any of the above State selections or that such selections were rejected in part to the extent national forest lands were included in the applications. Though from the evidence presented

13/ BLM adjudicatory decisions are not generally made available to the public at large nor are indices to such decisions maintained for public review as contemplated by 5 U.S.C. 552(a)(2) (1982) for the treatment of "final opinions * * * made in the adjudication of cases." In contrast, decisions of the Board of Land Appeals are considered "final opinions * * * made in the adjudication of cases" and the publication requirements of 5 U.S.C. § 552 (1982) are deemed applicable thereto. See 43 CFR 2.2.

14/ Since the original application as filed Mar. 10, 1966, claimed 4,260 acres (comprising lands outside the national forest) and, subsequent to the amendment of this application to include national forest lands, the State's application was approved as to 6,309 acres, a possible deduction from these serial register entries might be that conveyance of some national forest lands was approved.

in this case, it is known that Chugach National Forest lands were excluded from State selection applications A-053727 and A-067451 in agency adjudications of these selections, these decisions were not reflected on the MTP's or otherwise publicly disseminated. Even if the foregoing partial rejections had been duly noted on the MTP, two other State selection applications, A-058731 and A-063695, remain pending and their pendency independently bars conflicting appropriations of the same land (here, all of township 10).

[5] We turn to the effect of the two Forest Service withdrawal applications at issue. BLM appears to have erred, as a factual matter, in concluding that appellants' Toohey placer mining claims (AA-43831-850) were located on lands segregated by Forest Service withdrawal AA-6060. Appellants submit that before locating these claims, they "carefully consulted the Federal Register legal description of Forest Service withdrawal AA-6060, and described the locations of [their] claims by specific reference and in a manner which prevented any overlap" (Affidavit of Cynthia D. Toohey, dated Oct. 18, 1982). BLM does not dispute appellants' contention that their Toohey placer mining claims lie contiguous to the boundary of the 270-acre area encompassed by AA-6060, as opposed to within such area. From our comparison of the MTP for unsurveyed T. 11 N., R. 2 E., Seward Meridian, depicting the area withdrawn by AA-6060 with the locations depicted by appellants for the Toohey mining claims, we are satisfied that no conflict exists. In the event our map reading is in error and certain of the Toohey claims do lie within Forest Service withdrawal application AA-6060, the notation rule would operate to bar such claims.

Withdrawal application AA-6060 was filed by the Department of Agriculture with BLM on October 22, 1970. In 1970, BLM's regulations governing withdrawals, codified at 43 CFR Subpart 2311, provided in relevant part:

> § 2311.1-2 Segregative effect of applications.
>
> (a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed or in the tract books maintained by the Washington Office of the Bureau of Land Management if there is no Land Office for the State in which the lands are located shall temporarily segregate such lands from settlement location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.
>
> § 2311.1-4 Findings, reviews; publication.
>
> * * * * * * *
>
> (c) When an application is finally denied in whole or in part by the authorized officer, he will have published in the Federal Register a Notice of Determination which will specify the date and hour that the affected lands will be relieved of the segregative effect of the agency's application.
>
> (d) When an application is finally approved in whole or in part by the authorized officer, he will have published in the Federal Register an appropriate order of withdrawal or reservation.

In 1970, therefore, the notation rule existed in regulation as well as through adjudication. The segregative effect of a Forest Service withdrawal application commenced upon its recording on the MTP and it remained extant until adjudicated and a notice of determination published, as appropriate,

in the Federal Register. 15/ Here, the record reflects that Forest Service withdrawal application AA-6060 remains a pending application.

The other Forest Service withdrawal application, AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1982), is governed by distinct statutory and regulatory provisions that distinguish it from all other selections and withdrawals discussed thus far. Thus, section 204 of FLPMA (43 U.S.C. § 1714 (1982)), provides:

> (a) Authorization and limitation; delegation of authority
>
> On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section * * *.
>
> (b) Application and procedures applicable subsequent to submission of application
>
> (1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice. [Emphasis added.]

15/ Pursuant to regulations promulgated on Jan. 19, 1981, 46 FR 5796, "public lands described in a withdrawal application filed before October 21, 1976, shall remain segregated through October 20, 1991, from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the Federal Register notice or notices that pertain to the application, unless the segregative effect of the application is terminated sooner in accordance with other provisions of [43 CFR Part 2300]."
See 43 CFR 2310.2(b); 43 U.S.C. § 1714(g) (1982).

Apparent from the above is that Congress has mandated specific moments when the segregative effect of withdrawal applications shall terminate by operation of law. Pertinent to this case, that moment would be 2 years from the date of the Federal Register notice regarding the filing of Forest Service withdrawal application AA-23139. The required Federal Register notice for this withdrawal application was published December 5, 1978, at 43 FR 57134-57137. Hence, in the absence of rejection or approval of the application, its segregative effect automatically terminated on December 5, 1980. 16/ The Departmental regulations which implement the withdrawal provisions of section 204 of FLPMA are found at 43 CFR Part 2300. 17/

Against this backdrop, appellants contend that the Department is in violation of the will of Congress in permitting a continuing MTP notation of Forest Service withdrawal application AA-23139 to preclude other appropriation of the public lands subsequent to December 5, 1980, the date the segregative effect of AA-23139 terminated by statute. We agree. While we have held that the notation rule represents a valid administrative device for managing the status and disposition of public lands, we have also noted that the Department can regulate it out of existence whenever it desires. So,

16/ The Dec. 5, 1978, Federal Register notice properly advised:

"For a period of 2 years from the date of publication of this notice in the Federal Register, the above described lands will be segregated from location, selection, and entry to the extent that the withdrawal applied for, if effected, would prevent such forms of disposal, unless the application is rejected or the withdrawal is approved prior to that date. If the withdrawal is approved, it will be for a period of 2 years, unless duly extended."

17/ At 43 CFR 2310.2(a), it is provided in relevant part:

"Publication of the notice [of application for withdrawal] in the Federal Register shall segregate the lands described in the application or proposal from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the notice, for 2 years from the date of publication of the notice unless the segregative effect is terminated sooner in accordance with the provisions of this part."

of course, may Congress and it has done this by, inter alia, precluding any segregative effect to withdrawal applications filed after October 21, 1976, after 2 years from the date such applications are noted in the Federal Register. It was therefore error for BLM to extend application of the notation rule to Forest Service withdrawal application AA-23139 as grounds for rejecting appellants' mining claim locations effected in 1981.

Conclusion

Appellants' mining claims were properly declared null and void ab initio and the location notices rejected in view of the fact that all lands within Tps. 10 and 11 N., R. 2 E., Seward Meridian, were the subject of previously filed State selection applications that were noted on the MTP for these townships, regardless of whether or not the applications were void or voidable. Although BLM erred in holding that Forest Service withdrawal applications AA-6060 and AA-23139 also precluded appellants' mineral entry, this error does not obviate the segregative effect that attaches under the notation rule vis-a-vis the State selection applications noted on the MTP's.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

The majority, in effect, rejects appellants' broad attack on the "notation rule" and affirms the BLM's determination that all of the claims which are the subject of this appeal were null and void ab initio. While, as explained infra, I am in agreement with the majority's analysis, I wish to more fully explore one crucial aspect of its approach, viz., what are the records which are relevant for purposes of applying the notation rule.

The majority sets forth the historical genesis of the notation rule and I will not belabor that analysis here. 1/ However, I think it is important when we discuss the present scope of the notation rule to keep in mind the fact that it arose at a time when tract books were virtually the sole repository of information concerning land status. While withdrawals or other reservations would normally emanate from either the President or Secretary in Washington, D.C., the first knowledge as to their existence would usually occur upon transmittal of the information to the land office and the subsequent entry of the information on the tract books. Thus, anyone interested in making an appropriation of land would naturally resort to the tract books

1/ Appellants' suggestion that the notation rule is invalid per se, since it is the creature of practice rather than statute, ignores not only the many Federal Court decisions set out in the text which have upheld the application of the notation rule, but also the fact that Congress implicitly recognized the existence of this rule in the Act of May 14, 1880, 21 Stat. 140, as amended, 43 U.S.C. § 202 (1970), in which it was provided that where a homestead entryman filed "a written relinquishment of his claim in the local land-office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office." Thus, while Congress was clearly aware that the general rules of the GLO would require that the tract books be noted before the land would be available for a subsequent entry, it chose to provide for a specific exception to the general rule rather than to abrogate the entire rule.

in order to determine whether or not the land was open to such an appropriation, be it by settlement, entry, or the location of a mining claim.

Upon the adoption of the Federal Register Act, Act of July 26, 1935, 49 Stat. 500, as amended, 44 U.S.C. §§ 1501-11 (1982), however, an alternate source of information, i.e., the Federal Register, available to the public at large, came into existence. This source of information was not, unfortunately, all-inclusive, and therefore, the existence of the Federal Register did not obviate the need for recourse to the records of the Department in order to determine the status of public land.

Thus, while under Exec. Order No. 10355, 17 FR 4831 (May 26, 1952), all orders withdrawing lands or revoking a previous withdrawal were required to be published in the Federal Register, numerous other actions which might affect the status of the land were not necessarily published in the Federal Register. 2/ Included in such latter categories would be the filing of an application under regulations which provide that the filing segregates the land from the initiation of adverse rights under the public land laws, including the mining and mineral leasing statutes, as well as the cancellation of

2/ Exec. Order No. 10355 was issued to vest in the Secretary of the Interior the authority of the President to withdraw land granted both by the Pickett Act, 36 Stat. 847, 43 U.S.C. § 141 (1970), as well as the authority deemed to be granted the President by congressional acquiescence as delimited by the United States Supreme Court in United States v. Midwest Oil Co., 236 U.S. 459 (1915). Section 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792, repealed not only the Pickett Act but the implied authority to withdraw land arising from congressional acquiescence. Moreover, section 204 of FLPMA, 43 U.S.C. § 1714 (1982), granted the Secretary direct authority to withdraw lands and modify or revoke existing withdrawals. Thus, it is questionable whether Exec. Order No. 10355 has any present relevance. Paradoxically, however, the present regulations, adopted after the passage of FLPMA, expressly cross-reference the procedures established by the Executive Order in promulgation of any withdrawal by the Secretary under FLPMA. See 43 CFR 2310.3-3.

subsisting entries whose existence would preclude others from obtaining rights on the public lands. An additional factor contributing to the confusion in this matter revolves around the retirement of the tract book system as the general method for showing land status, and its replacement with MTP's, HI's, other Use Plats, and the like. The operative question presented by the instant case is whether, and under what circumstances, an individual is justified in relying upon one set of documents or records which would indicate that the land is available where another document or record indicates that it is not open to entry.

The majority expressly holds that the individual case files maintained by BLM are not part of the public records of the Department for the purposes of determining the ambit and scope of the notation rule. Since, as the majority notes, the HI does not actually contradict the MTP, the effect of this holding is to avoid the question whether conflicting land status entries allow an individual to proceed on his or her own peril. This is, indeed, the nub of the present controversy, since a review of the case files for state selections A-053727 and A-067451 clearly shows that, contrary to the evidence of the MTP, these two selections had been rejected as to those lands described which were within the Chugach National Forest. Appellants essentially argue that it is ridiculous to hold that the notation of these two state selections on the MTP served to segregate the land from entry until the notations were removed when, in fact, BLM has long since rejected these selections in formal adjudicatory action. 3/ While I think there is a some legitimacy to

3/ It is important to point out that, in reality, only the land in T. 11 N., R. 2 E., would be ultimately affected by a determination that these two notations were ineffective to result in a segregation of the land from entry. Two other state selections, A-058731 (mineral estate only) and A-063695, which have not been rejected, cover T. 10 N., R. 2 E. While appellants make

appellants' complaints, I have come to the conclusion that, insofar as the notation rule is concerned, the individual case files of the Department are not part of the public records for the purposes of determining the scope of the rule.

What, then, constitute the records which serve as the basis for the operation of the notation rule? Clearly, the majority agrees that the MTP is such a record. I would go further and rule that, in addition to the MTP, the HI and the other Use Plats are also such records and that where there is a conflict in notations, the notation rule does not apply.

The original tract books operated as a combination master title plat and historical index. Thus, not only did the tract book enable an individual to discern the present status of a specific parcel of land, but it also permitted the searcher to review the chronology of the land office actions affecting the parcel. 4/ It seems to me totally consistent with traditional

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fn. 3 (continued)
various arguments that these, too, should not be a bar to the initiation of mining claims, their arguments on this issue relate to a different question, viz., whether an application which cannot be allowed and is therefore subject to rejection can nevertheless serve to segregate land until it is, in fact, rejected. Numerous cases cited by the majority clearly establish that the notation of an entry or application, regardless whether the application or entry is void or merely voidable, segregates the land until the application is actually rejected. Indeed, this is essential to the workings of any notation rule, and appellants' contrary assertions are properly rejected.

4/ Admittedly, notations were also made on township plats returned by cadastral survey, but these were normally made in pencil unless the application was subsequently allowed as an entry or its equivalent. If the application were rejected, the pencil notation would be erased. See Circular No. 375 (Jan. 22, 1915). As a result, the plats were not as useful as the tract book in ascertaining past status of the land. The tract books, however, unlike the present MTP's which only show present land status of any Federal land, would provide a permanent record of past actions such as withdrawals, applications, or entries, even after they had been revoked, expired, or rejected, so that it would be possible to ascertain the availability of land at any specific moment in the past.

land office practice to read the MTP in conjunction with the historical indices and other use plats in ascertaining current land status.

If these records should show a conflict, for example where the MTP contained a notation of a pending state selection but the HI showed that it had been finally rejected, I think an individual could justifiably proceed in accordance with the entry on the HI provided that this notation was correct. In other words, an individual could proceed at his own peril, knowing that if, in fact, the HI was erroneous, all of his efforts towards appropriating a right to the public land would come to naught. It is, however, important to recognize that where the state selection is, in fact, still pending and the individual is thereby precluded from the initiation of adverse rights, the attempted initiation of such rights would not run afoul of the notation rule, but would rather be defeated by the segregative effect of the state selection which works independently of the notation rule.

This last consideration can best be illustrated by way of example. Let us assume that Congress has enacted legislation withdrawing T. 4 N., R. 1 E., Seward Meridian, Alaska, from all forms of disposition under the public land and mineral laws. In noting this action on the records, a clerical mistake is made and the withdrawal is actually noted on T. 4 N., R. 1 W. Under the notation rule, the notation of this withdrawal would preclude the initiation of new rights in T. 4 N., R. 1 W., until such time as it was properly corrected. But, the land in T. 4 N., R. 1 E., is not open to location merely because the entry was erroneously made on the wrong township plat. On the contrary, that land is withdrawn independent of the notation rule by the action of Congress.

In my view, where there are conflicting notations on the records, I feel that the notation rule cannot be rationally applied. Thus, as we have noted on numerous occasions:

> The notation rule is grounded, in part, on recognition that, considering the incredible amount of activity concerning the use and possible acquisition of Federal land, it is inevitable that errors will occur in noting the relevant records. [5/] Fairness to all members of the public dictates that, where records are improperly noted so as to appear to effectively foreclose the initiation of rights by individuals in a specific tract of land, the Department should treat the land in question as it is noted on the records, until such time as the records are changed to correctly reflect the true status of the land.

Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 327 (1982). If the notations conflict, however, on which notation is an individual justified in relying? Indeed, the situation could develop where the MTP showed no pending state selection whereas the HI had failed to note that an earlier selection had been rejected. An individual, careful enough to inquire as to the status of the land, might only peruse the MTP. Based on such a review, an individual might determine that the land is open. If, in fact, the state selection had been rejected, I do not see how we could justify invoking the notation rule to defeat the individual's entry since the whole animating rationale of the notation rule is that people have a general right to rely on the records of the Department. It is onerous enough that, should the land be withdrawn and the records fail to indicate this fact, an individual will

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5/ It is on this point that the BLM proposal to abolish the notation rule seems most questionable. BLM's justification for its proposal, set out in the majority opinion, is singularly silent about the effect of improper notations, even though such errors were not only part of the original predicate for the notation rule but have also generated the great amount of adjudication on the scope of the rule. Effectively, the abolition of the notation rule would seem to sanction the practice of entering lands in apparent trespass in the hope or expectation that the individual would be able to prove that the land was open, even though the records of the Department would indicate that it was closed to adverse appropriation.

acquire no rights thereto, even though he may have relied on a review of the MTP. It seems clearly excessive if, in addition to this possibility, a prospective appropriator is also required to search all records of the Department to make sure that there is no errant notation on any one of them which might defeat his entry even though there is no existing withdrawal or application which would foreclose his attempting appropriation. Fairness to all parties impels the conclusion that the notation rule cannot apply to foreclose entry where the relevant records themselves disagree on the status of the land.

Appellants seek to expand this rule by including in the ambit of relevant records the specific case files relating to individual applications. Such case files, however, do not even purport to establish the status of the land. Indeed, such an expansion would necessarily abrogate the notation rule insofar as all erroneous notations were concerned, since a review of the case file would establish that the notation was erroneous. It is, indeed, an exception that would proceed to eat the rule. Moreover, it is hard to credit a view that all case files are part of the official land status records of which any individual must be knowledgeable since many records would not be readily obtainable in the State Office for a variety of reasons. 6/ Individual case files were maintained even while the tract book system was in use, but this was never deemed to support the view that a notation on a tract book must give way to what was disclosed in an individual case file. Appellants' attempt to include such files as part of the land status records of the Department is properly rejected.

6/ As an example, case file A-053727 which is at issue in the present case was sent to the Federal Records Center in 1974. It was ultimately retrieved from the record center. However, it was apparently misplaced in the State Office which has been unable to locate it. How could someone be expected to rely on such a record?

Inasmuch as the MTP showed that the land in both T. 10 N., R. 2 E., and T. 11 N., R. 2 E., was not available for appropriation as it was embraced in various state selection applications, 7/ appellants' mining locations were precluded either by the segregative effect which flowed from the filing of the unadjudicated selection applications (43 CFR 2091.6-4) or by the workings of the notation rule for those applications which had been rejected, unless appellants could show that, insofar as this second category was concerned, the relevant records were themselves in conflict. While evidence on an HI that the application had been rejected would establish such a conflict, the failure of the HI to even note the filing of such an application did not rise to such a level. Accordingly, I concur with the majority's conclusion that the Alaska State Office correctly determined the subject claims to be null and void ab initio. 8/

James L. Burski
Administrative Judge

7/ Appellants' declaration that they question whether the MTP's showed the same status entries on the date of the locations of their claims that they did at the time of the State Office adjudication would have more force if accompanied by an assertion that they had examined the relevant MTP's prior to the location of their claims. Thus, in James M. Chudnow, 67 IBLA 143 (1982), appellant positively averred that he had examined the oil and gas plat for a specific township and that, when he did so, it did not show the existence of an outstanding oil and gas lease for a parcel in question. This is a far cry from appellants' complaints herein that the MTP's might not have shown the existence of the state selection applications in question at the time the claims were located.

8/ I also wish to expressly note my agreement with the majority's ruling that a post-FLPMA application to withdraw land is effective to segregate the land only for the period of time expressly provided by section 204(b) of FLPMA, 43 U.S.C. § 1714(b) (1982), regardless of whether or not the notation of the application to withdraw has been removed from the records. Just as the Act of May 14, 1880, 21 Stat. 140, as amended, 43 U.S.C. § 202 (1970), established a statutory exception to the notation rule (see n.1, supra), so must this provision be read as overriding the notation rule insofar as applications for withdrawal are concerned. This holding, however, does not alter the disposition of the specific claims on appeal as the land in question was independently affected by various state selections.